

KONDOS & KONDOS LAW OFFICES

DOCKET FILE COPY ORIGINAL

DANIEL P. KONDOS, S.C.*
CAROL C. KONDOS, P.C.*#
WILLIAM E. ROBBMS
ANJEL K. AVANT
ROBERT J. NUSSBAUM
SALLY J. ROBBMS
HILARY THOMAS+
JOHN M. SCHUTZA

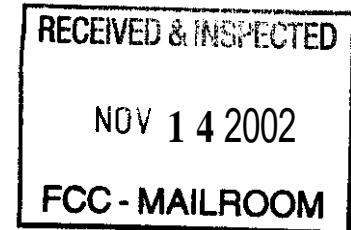
1595 NORTH CENTRAL EXPRESSWAY
RICHARDSON, TEXAS 75080-3590

(972) 231-9924
METRO (817) 337-3100
FACSIMILE (972) 231-8636
www.kondosandkondos.com

DALLAS OFFICE

November 13, 2002

ALSO MEMBER OF:
WISCONSIN BAR
ILLINOIS BAR
+ CALIFORNIA BAR



Via Overnight Delivery

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
9300 East Hampton Dr.
Capitol Heights, MD 20743

Re: CG Docket No. 02-278; In the Matter of the Rules and Reg's Implementing
the Telephone Consumer Protection Act of 1991; Notice of Proposed Rulemaking

Dear Commissioners of the FCC:

The FCC's September, 2002, Notice of Proposed Rulemaking (at 25, ¶ 39) seeks comment on the FCC's "determination that a prior business relationship between a fax sender and recipient establishes the *requisite* consent to receive telephone fa[x] ad[s]". (em. added)

The next sentence in the FCC's Proposed Rulemaking acknowledges why I submit the FCC should not "preserve the 'exemption'" and should rule that an established business relationship (hereinafter "EBR") can not possibly equate to, be deemed to be or imply "prior *express* invitation or permission". The next sentence reads:

[t]his [EBR] determination has amounted to an effective exemption ...*although our rules do no expressly provide for such an exemption.*

Notice of Proposed Rulemaking at 25, 139. (em. added)

No. of Copies rec'd _____
List ABCDE _____

Not only is an EBR not a defense to unsolicited fax advertising under the TCPA, the U.S. Congress specifically included such a defense in numerous predecessor TCPA bills and then excluded it in the law which overwhelmingly passed in 1991. Attached hereto is a document which summarizes the “Authorities in Support of the Fact that an [EBR] is not a Defense [to a TCPA fax ad claim]...” which sets forth and attaches a precise chronology of the pertinent legislative history of the TCPA. See, Exhibit “A”, tabs 1-3 & 10-12.

Not only did the EBR defense get excluded by the U.S. Congress for fax advertising it was added as a defense to phone solicitations in predecessor bills to the TCPA and remained a defense for phone solicitations in the TCPA. 47 U.S.C. § 227(a)(3) & Exhibit A at 1-3.

A basic and indisputable canon of statutory construction is that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). This rule of construction applies to the TCPA because the EBR exemption *does* exist for a “telephone solicitation.” 47 U.S.C. § 227(a)(3).

In contrast to the plain language of the TCPA which does not include an EBR defense for faxing and its demonstrated legislative intent to exclude such defense for faxing, the FCC purported to create such a defense in an internally contradicting footnote in its 1992 Rulemaking. In footnote number 87 thereof, in a sentence immediately following the FCC’s correct recognition that it was “without discretion to create exemptions from or limit the effects of the prohibition [on fax advertising]” the FCC purported to “note” just such an exemption – the same one rejected by the U.S. Congress – an EBR.’ A possible source of the FCC’s contradiction in purporting to create an exemption immediately after recognizing that they had no such authority is revealed by its own internal citation to paragraph 34 as support for its conclusion. Paragraph 34 therein solely pertains to phone solicitations, not fax advertising.

The FCC’s purported creation of this exemption immediately after acknowledging that it could not do so would render meaningless and superfluous the EBR defense for phone

¹ In pertinent part the FCC stated:

[SENTENCE#1] The TCPA further prohibits the use of telephone facsimile machines to send unsolicited advertisements. [#2] In banning telephone facsimile advertisements, *the TCPA leaves the [Federal Communications] Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA.* § 64.1200(a)(3). [#3] We note, however, that facsimile transmissions from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, *supra* [which solely pertains to telephone solicitations]

solicitations in the immediately preceding section of the TCPA. 47 U.S.C. § 227(a)(3) as opposed to (a)(4))² At least three (3) Courts have rejected the alleged EBR defense to an unsolicited fax ad claim. One opinion written by a Dallas state court judge (now Dallas federal judge David Godbey) states:

Here, the FCC's interpretation of the EBR defense would act to amend the TCPA's definition of an unsolicited advertisement *from* a fax sent without the recipients "prior express invitation or permission," *to* a fax sent without the recipient's prior express or implied invitation or permission. That interpretation conflicts with the plain language of the statute.

Exhibit " B at 4-5. Two other such orders are attached as Exhibits "C" and "D"

"[N]o deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employee Retirement System v. Betts*, 492 U.S. 158, 171 (1989). This is one of thirteen U.S. Supreme Court cases where the FCC and other federal agency interpretations of statutes have been afforded "zero deference". Exhibit "A" at 4-7.

Judge Godbey's rationale and authorities are unassailable:

With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to express invitations; the FCC's interpretation would effectively delete that limitation from the statute. The Court cannot support an interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no "EBR or "implied permission" exception to the definition of unsolicited advertisement for faxes.

Exhibit "B" at 5 (em. in original).

The words "prior express invitation or permission" are not ambiguous' and the FCC was not provided express authority to define them. The FCC had no authority to modify, regulate or

² The FCC has at least twice since this 1992 publication cited to its own contradictory dicta from footnote 87 in purported further support of the EBR defense. The first was in a document responding to the request of numerous entities to provide "reconsideration and clarification" to the 1992 report itself. 10 F.C.C.R. 12,391, n. 2 & ¶ 37 (1995). The second was in a public notice entitled "FCC Reminds Consumers About 'JunkFax' Prohibition", 2001 WL 138410 (Feb. 2001). Of course, the FCC's repetition and citation to its original erroneous conclusion where it relied on its own discussion of telemarketing exemptions, which include an EBR, does not lend authoritative value to such conclusion. Needless to say, "the repetition of a dictum [even by a federal court] does not turn it into a holding". *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937, 56 (1994).

³ When the full definition is read there is no doubt as to its clarity: "[t]he term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without *that person's prior express invitation or permission*." 47 U.S.C. § 227(a)(4)

define the definition of “unsolicited advertisement” for faxing in subsection (a)(4) of the TPCA. 47 U.S.C. § 227(b)(2) The TCPA states:

The [Federal Communications] Commission shall prescribe regulations to implement the requirements of this subsection.

Id. (em. added). Congress, of course, knew the difference between a section and a subsection. This distinction demonstrates that Congress mandated the FCC to enforce the ban on unsolicited fax advertising but did not provide the FCC authority to change the definition of an unsolicited fax advertisement (eg. engraft an EBR defense for fax advertising).

In pertinent part, the definitions set forth in subsection (a) of the TCPA apply to “this section” or, all of the TCPA, which is set forth in Section 227. However, the FCC’s authority is limited to “prescrib[ing] regulations to implement the requirements of this subsection” which is contained in subsection (b) of Section 227. The definition of an “unsolicited [fax] advertisement” is contained in subsection (a), hence, the FCC did not have authority to interpret that definition or enlarge it with an “EBR defense”. 47 U.S.C. § 227(b)(2), (a)(4) & (b)(1)(c)⁴

Even assuming *arguendo* that the first sentence of (b)(2) gave the FCC authority to “prescribe regulations to implement the requirements” of (a)(4) and/or (b)(1)(C), as those subparagraphs together contain the complete ban on fax ads, the result is the same, any such regulation must implement the requirements of that complete ban and not limit that complete ban or create exemptions for it as the FCC has correctly acknowledged. In the Matter of the Rules and Regulations Implementing the TCPA, (92-90)(October 16, 1992), ¶ 54 & footnote 87. (“the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (*see* § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the *TCPA*.”)(em. added)

For these reasons, I respectfully submit that the FCC should not preserve its “EBR” exemption to the unlawful act of having someone send an unsolicited fax ad on your behalf.

Yours truly,



Carol C. Kondos

cc: Ms. Kelli Farmer

Via Overnight Delivery (w/four copies of this letter)

⁴ Subparagraphs(b)(2)(A), (B) & (C) define what the FCC “shall” and “may” do, respectively, “[i]n implementing the requirements of this subsection”. 47 U.S.C. § 227(b)(2) No reference in those subparagraphs relates to subparagraphs(a)(4) or (b)(1)(C) the definition of an unsolicited advertisement and the complete ban on unsolicited fax ads, respectively.

Federal Communications Commission
Room 4-C740
445 12th Street, S.W.
Washington, DC 20554

A

U

**AUTHORITIES IN SUPPORT OF THE FACT THAT AN “ESTABLISHED
BUSINESS RELATIONSHIP” IS NOT A DEFENSE TO SENDING
AN UNSOLICITED FAX AD UNDER THE TCPA AND THE FCC HAD NO
AUTHORITY TO MAKE AN EBR A DEFENSE TO SAME**

I. THREE VERSIONS OF THE HOUSE PREDECESSOR BILL TO THE TCPA INCLUDED AN EBR EXEMPTION FOR UNSOLICITED FAX ADS:

The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person (A) without that person’s prior express invitation or permission, or (B) with whom the caller does not have an established business relationship.

1. H.R. 1304, 102d Cong., 1st Sess. § 3, § 227(a)(4), Telephone Advertising Consumer Rights Act (Passed by the House, Nov. 18, 1991)(Bill version 1 of 4);
2. H.R. 1304, 102d Cong., 1st Sess. § 3, § 227(a)(4), Telephone Advertising Consumer Rights Act (Received, read twice and referred to the Comm. on Commerce, Science and Trans., Nov. 18, 1991)(Bill version 3 of 4); and
3. H.R. 1304, 102d Cong., 1st Sess. § 3, § 227(a)(4), Telephone Advertising Consumer Rights Act (Reported in the House)(Bill version 4 of 4).

II. A PREDECESSOR TCPA BILL IN THE HOUSE DID NOT INCLUDE AN EBR EXEMPTION FOR TELEPHONE SOLICITATIONS

4. H.R. 1304, 102d Cong., 1st Sess. § 2, § 227(a)(3), Telephone Advertising Consumer Rights Act (Introduced in the House)(Bill version 2 of 4):

The term ‘telephone solicitation’ means the initiation of a telephone message for the purpose of encouraging a person to purchase, rent, or invest in property, goods, or services without that person’s prior express invitation or permission.

AUTHORITIES IN SUPPORT OF THE FACT THAT AN “ESTABLISHED BUSINESS RELATIONSHIP” IS NOT A DEFENSE TO SENDING AN UNSOLICITED FAX AD AND THE FCC HAD NO AUTHORITY TO MAKE AN EBR A DEFENSE TO SAME

Page 1



III. THREE PREDECESSOR TCPA BILLS IN THE SENATE DID NOT INCLUDE AN EBR EXEMPTION FOR FAX ADS

The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission. [The precise definition in the TCPA]

5. S. 1462, 102d Cong., 1st Sess. § 2, § 228(a)(3), Automated Telephone Consumer Protection Act (Passed the Senate)(November 7, 1991)(Bill version 1 of 5);
6. S. 1462, 102d Cong., 1st Sess. § 2, § 228(a)(3), Automated Telephone Consumer Protection Act (Introduced in the Senate)(July 11, 1991)(Bill version 2 of 5); and
7. S. 1462, 102d Cong., 1st Sess. § 2, § 228(a)(3), Automated Telephone Consumer Protection Act (Reported in the Senate)(October 8, 1991)(Bill version 3 of 5).

IV. THE LAST TWO PREDECESSOR TCPA BILLS EXCLUDED AN EBR EXEMPTION FOR FAX ADS AND INCLUDED AN EBR EXEMPTION FOR TELEPHONE SOLICITATIONS

8. S. 1462, 102d Cong., 1st Sess. § 3, § 227(a)(3) & (a)(4), Telephone Consumer Protection Act of 1991 (Enrolled Bill as passed by the House and Senate and sent to the President)(November 1991)(Bill version 4 of 5); and
9. S. 1462, 102d Cong., 1st Sess. § 3, § 227(a)(3) & (a)(4), Telephone Consumer Protection Act of 1991 (Engrossed House Amendment)(November 1991)(Bill version 5 of 5).

V. THE TCPA WAS A MERGER OF THE PRINCIPAL PROVISIONS OF H.R. 1304 AND S. 1462

10. 137 Cong. Rec. S18781-02 (Nov. 27, 1991) (Statement of Senator Hollings):

Mr. President, I am pleased to report that we have come to an agreement with the House on a bill to restrict invasive uses of telephone equipment. The amended version before the Senate today of S. 1462 ... incorporates the principal provisions of ... H.R. 1304, which passed the House on November 18.

**AUTHORITIES IN SUPPORT OF THE FACT THAT AN “ESTABLISHED BUSINESS
RELATIONSHIP” IS NOT A DEFENSE TO SENDING AN UNSOLICITED FAX AD AND
THE FCC HAD NO AUTHORITY TO MAKE AN EBR A DEFENSE TO SAME**

VI. THE TCPA EXCLUDED THE EBR EXEMPTION FOR UNSOLICITED FAX ADS AND INCLUDED AN EBR EXEMPTION FOR TELEPHONE SOLICITATIONS

11. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(a)(4):

The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.

See, § 227(a)(3) for EBR exemption for telephone solicitations.

VII. THE PRIOR GEORGE BUSH ADMINISTRATION OPPOSED SENATE BILL 1462 WHEN IT HAD NO EBR EXEMPTION FOR TELEPHONE SOLICITATIONS AND SIGNED IT AFTER ONE WAS ADDED FOR TELEPHONE SOLICITATIONS

12. Statement of the President of the United States, George Bush, Sr., upon signing S. 1462 (December 23, 1991):

Today I have signed into law S. 1462, the “Telephone Consumer Protection Act of 1991.” This legislation is designed for the laudable purpose of protecting the privacy rights of telephone users. However, the Act could also lead to unnecessary regulation or curtailment of legitimate business practices. That is why the Administration opposed it when it was pending before Congress. ... I have signed the bill because it gives the [FCC] ample authority to preserve legitimate business practices. These include automated calls to consumers with whom a business has preexisting business relationships, such as calls to notify consumers of the arrival of merchandise ordered from a catalog.

VIII. THE FCC PURPORTS TO INTERPRET, IN DICTA, WHAT BOTH HOUSES OF CONGRESS AGREED TO AND PASSED, A TCPA WITHOUT AN EBR EXEMPTION FOR FAX ADS

13. FCC, In the Matter of the Rules and Regulations Implementing the TCPA, (92-90)(October 16, 1992):

The TCPA further prohibits the use of telephone facsimile machines to send unsolicited advertisements.

In banning telephone facsimile advertisements, the TCPA leaves the [Federal Communications] Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmissions from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra [which solely pertains to telephone solicitations]

IX. U.S. SUPREME COURT AUTHORITY

14. *Rodriguez v. Unitedstates*, 480 U.S. 522,525 (1987):

Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. (U. S. Supreme Court authority omitted)

15. *Russello v. United States*, 464 U.S. 16, 23 (1983):

[after setting forth quote from *Rodriguez* above] ... Had Congress intended to restrict § [] (a)(1) ... it presumably would have done so expressly as it did in the immediately following subsection (a)(2). [2 U. S. Supreme Court cases cited as authority omitted] “The short answer is that Congress did not write the statute that way.”

16. *I.N.S. v. Cardoza-Fonseca*, 480U.S. 421,432 (1987):

AUTHORITIES IN SUPPORT OF THE FACT THAT AN “ESTABLISHED BUSINESS RELATIONSHIP” IS NOT A DEFENSE TO SENDING AN UNSOLICITED FAX AD AND THE FCC HAD NO AUTHORITY TO MAKE AN EBR A DEFENSE TO SAME

The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress [like with the TCPA] simultaneously drafted [one section] and amended [the other]. In doing so, Congress chose to maintain the old standard in [one section], but to incorporate a different standard in [the other]. [U.S. Supreme Court's quote from the *Russello* case for proposition reaffirmed by the *Rodriguez* quote set forth above omitted] ... The message conveyed by the plain language of the Act is confirmed by an examination of its history.... Congress declined to enact the Senate version of the bill...

17. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n. 9 (1984):

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

...

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. (9 U. S. Supreme Court cases cited as authority omitted)

18. *Gregory v. Ashcroft*, 501 U.S. 452, 485 & n.3 (1991):

The dissent argues that we should defer to the EEOC's view regarding the scope of the "policymaking level" exception. [internal cite omitted] I disagree.

...

In any event, the EEOC's position is, for the reasons discussed above, inconsistent with the plain language of the statute at issue. "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."

19. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991):

But administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference. (U.S. Supreme Court authority omitted)

20. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 170 (1989):

AUTHORITIES IN SUPPORT OF THE FACT THAT AN "ESTABLISHED BUSINESS RELATIONSHIP" IS NOT A DEFENSE TO SENDING AN UNSOLICITED FAX AD AND THE FCC HAD NO AUTHORITY TO MAKE AN EBR A DEFENSE TO SAME

But, of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.

21. *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824,837 (1983):

Even if that interpretation could be characterized as consistent, it would not be entitled to deference, for, as we have noted above, it is inconsistent with the statutory language. (U.S. Supreme Court authority omitted.)

22. *Cowart v. Nicklos Drilling Company*, 505 U.S. 469,476 (1992):

The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written. The principle can at times come into some tension with another fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency.

...

Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms. (U.S. Supreme Court authority omitted.)

23. *United States v. Locke*, 471 U.S. 84, 95-96 (1985):

Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result.

On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used."

24. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551,566 n. 20 (1979):

But this deference [to agency interpretation] is constrained by our obligation to honor the clear meaning of a statute, as revealed by its

language, purpose, and history. On a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Act. (citations to 6 U.S. Supreme Court cases omitted.)

25. *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 109 (1993):

“no deference is due to agency interpretations at odds with the plain language of the statute itself”. We therefore cannot accept current pleas for the deference described in *Skidmore* or *Chevron*.

26. *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979):

Although an agency's interpretation of the statute under which it operates is entitled to some deference, “this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.”

...

Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so.

THIS SEARCH	THIS DOCUMENT	GO TO
Next Hit	Forward	New Bills Search
Prev Hit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

Bill 1 of 4

There are 3 other versions of this bill.

References to this bill in the Congressional Record	Link to the Bill Summary & Status file.	Full Display - 19,345 bytes. [Help]
---	---	---

Telephone Advertising Consumer Rights Act (Passed by the House)

102d CONGRESS

1st Session

E. R 1304

AN ACT

To amend the Communications Act of 1934 to regulate the use of telephones in making commercial solicitations.

HR 1304 EH

102d CONGRESS

1st Session

H. R. 1304

AN ACT

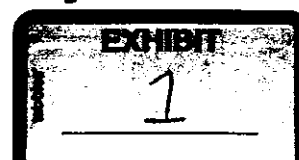
To amend the Communications Act of 1934 to regulate the use of telephones in making commercial solicitations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Telephone Advertising Consumer Rights Act'.

SEC. 2. FINDINGS.



The Congress finds that:

- (1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.
- (2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.
- (3) More than 300,000 solicitors call more than 18,000,000 Americans every day.
- (4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.
- (5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
- (6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.
- (7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.
- (8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.
- (9) Individuals privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

SEC.3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

Title II of the Communications Act of 1934 is amended by inserting immediately after section 226 (47 U.S.C.226) the following new section:

'SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

'(a) DEFINITIONS. As used in this section:

'(1) The term 'automatic telephone dialing system' means equipment which has the capacity—

'(A) to store or produce telephone numbers to be called, using a random or sequential number generator;

'(B) to ~~dill~~ such numbers; and

'(C) to deliver, without ~~initial live operator~~ assistance, ~~a~~ prerecorded voice message to the number ~~dilled~~, with ~~or~~ without ~~manual~~ assistance.

'(2) The term 'telephone facsimile machine' means equipment which ~~has the capacity to~~ do either ~~or~~ both of the following: (A) to ~~transcribe~~ text ~~or images (or both) from paper~~ into an electronic signal and to ~~transmit that signal over a regular telephone line~~, or (B) to ~~transcribe~~ text ~~or images (or both) from an electronic signal received over a regular telephone line onto paper~~.

'(3) The term 'telephone solicitation' means the initiation of ~~a~~ telephone call ~~or~~ message for the purpose of encouraging the purchase ~~or~~ rental of, ~~or~~ investment in, property, goods, or services, which is transmitted to any person (A) without that person's prior express invitation ~~or~~ permission, ~~or~~ (B) with whom the caller does not have an established business relationship. Such term ~~doer~~ not include a call ~~or~~ message by a ~~tax~~ exempt nonprofit organization.

'(4) The term '~~unsolicited advertisement~~' means any material advertising the commercial availability ~~or~~ quality of any property, goods, ~~or~~ services which is transmitted to any person (A) without that person's prior express invitation ~~or~~ permission, ~~or~~ (B) with whom the caller does not have an established business relationship.

'(b) **RESTRICTIONS-** It shall be unlawful for any person within the United States by means of telephone—

*(1) to make any telephone solicitation in violation of the regulations prescribed by the Commission pursuant to subsection (c);

'(2) to ~~use~~, to **make** my telephone solicitation, any telephone facsimile machine ~~or~~ any automatic telephone dialing system that does not comply with the technical and procedural standards prescribed under subsection (d), ~~or~~ to ~~use~~, to make any telephone solicitation, any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards;

'(3) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement in violation of any regulations prescribed by the Commission pursuant to subsection (e);

'(4) to **use** any automatic telephone dialing system to make unsolicited calls--

'(A) to any emergency telephone line or pager of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; or

'(B) to any telephone number assigned to paging, specialized mobile radio, or cellular telephone service; or

(5) to use a computer or other electronic device to send an unsolicited advertisement via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the advertisement or on the first page of each transmission, the date and time it is sent, an identification of the business sending the advertisement, and the telephone number of the sending machine or of such business.

(c) Protection of Subscriber Privacy Rights-

(1) RULEMAKING PROCEEDING REQUIRED- Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) REGULATIONS- Not later than 240 days after the date of enactment of this section, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) USE OF DATABASE PERMITTED- The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, or to receiving certain classes or categories of telephone solicitations, and to make that compiled list available for purchase. If the Commission determines to require such a database, such regulations shall--

'(A) specify a method by which the Commission will select an entity to administer such database;

'(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

'(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

'(D) specify the methods by which such objections shall be collected and added to the database;

'(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

'(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

'(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

'(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

'(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with subsection (b);

'(J) be designed to enable and require States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

'(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

'(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this

section and the regulations thereunder.

'(4) CONSIDERATIONS REQUIRED FOR USE OF DATABASE METHOD- If the Commission **determines to require the database mechanism described in paragraph (3),** the Commission shall--

'(A) in developing procedures for **gaining** to the **database, consider** the different needs of telemarketers conducting business **on a national, regional, State, or local level;**

'(B) develop a fee schedule or price **structure for recouping the cost of such database that recognizes such differences and--**

'(i) reflect the relative costs **of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;**

'(ii) reflect the relative **costs or providing such lists on paper or electronic media; and**

'(iii) not place an **unreasonable financial burden on small businesses; and**

'(C) consider (i) whether the needs of telemarketers operating on a local basis could **be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.**

'(d) TECHNICAL AND PROCEDURAL STANDARDS-

'(1) **TELEPHONE FACSIMILE MACHINES-** The Commission shall **revise** the regulations setting technical **and** procedural **standards** for telephone facsimile machines to require that any such machine which is **manufactured after 6 months after the date of enactment of this section** clearly marks, in a margin at the top **or** bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification **of the business or other entity sending the advertisement, and the telephone number of the sending machine or of such business. The Commission shall exempt from** such standards, for **12 months after** such date of enactment, telephone facsimile machines that do not have the capacity for automatic dialing and **transmission and that are not capable of operation through an interface with a computer.**

'(2) **AUTOMATIC TELEPHONE DIALING SYSTEMS-** The Commission shall prescribe technical and procedural **standards** for automatic telephone dialing systems **that are used to transmit any prerecorded telephone solicitation. Such standards shall require that--**

'(A) all prerecorded telephone messages (i) shall, at the beginning **of the message, state clearly the identity of the business or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business or other entity; and**

'(B) such systems will, as soon as is technically practicable (given the limitations of the telephone exchange service facilities) after the called party hangs up, automatically create a disconnect signal or non-hook condition which allows the called party's line to be released

'(e) **CONSIDERATION OF FACSIMILE MACHINE RESTRICTIONS** Within 120 days after the date of enactment of this section, the Commission shall initiate a rulemaking proceeding to prescribe rules to restrict the use of any telephone facsimile machine or computer or other electronic device to send any unsolicited advertisement to the telephone facsimile machine of any person. In establishing such restrictions, the Commission shall consider--

'(1) the extent to which unsolicited advertisements are transmitted through telephone facsimile machines;

'(2) the extent to which recipients of such advertisements incur costs for such receipt; and

'(3) the most cost effective methods of preventing advertising abuses with telephone facsimile machines.

'(f) **EFFECT ON STATE LAW-**

'(1) **STATE LAW NOT PREEMPTED-** Nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits, either or both of the following:

'(A) The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements.

'(B) The use of automatic telephone dialing systems to transmit prerecorded telephone solicitations.

'(2) **STATE REGULATION OF TELEPHONE SOLICITATIONS-** If, pursuant to subsection (c), the Commission requires the establishment of a database of telephone numbers of subscribers who object to receiving telephone solicitations or a functionally equivalent methods or procedures of Federal regulation, a State or local authority may not develop any different database or system for use in the regulation of telephone solicitations and may not enforce restrictions on telephone solicitations in any manner that is not based upon the requirements imposed by the Commission.

'(3) **STATE ENFORCEMENT PERMITTED-** Nothing in this section or in the regulations prescribed under this section shall prohibit the segmentation of the database or functionally equivalent method or procedure for use by State or local authorities, nor preempt any State or local authority from creating mechanisms to enforce compliance with the database or functionally equivalent system, or a segment thereof.

'(g) **EFFECTIVE DATE OF REQUIREMENTS-** The requirements of this section shall take

effect 30 days after the date that regulations are prescribed under subsection (c).'

SEC. 4. CONFORMING AMENDMENT.

Section 2@) of the Communications Act of 1934 is amended by striking 'Except as provided' and all that follows through 'and subject to the provisions' and inserting 'Except as provided in sections 223 through 227, inclusive, and subject to the provisions'.

SEC. 5. ALLOCATION OF AM RADIO FREQUENCIES.

Section 331 of the Communications Act of 1934 is amended--

(1) by striking the heading of such section and inserting the following:

'FREQUENCY ALLOCATION POLICIES';

(2) by inserting '(a) VERY HIGH FREQUENCY STATIONS-' after 'Sec. 331.'; and

(3) by adding at the end the following new subsection:

'(b) AM RADIO FREQUENCIES- It shall be the policy of the Commission, in any case in which the licensee of an existing AM daytime-only station located in a community with a population of more than 100,000 persons that lacks a local fulltime aural station licensed to that community and that is located in or adjacent to a major metropolitan market notifies the Commission that such licensee seeks to migrate to a new frequency, for the Commission to ensure that such a licensee receives an allotment or assignment to such a new frequency, if technically feasible.'

Passed the House of Representatives November 18, 1991

Attest:

Clerk

HR 1304 EH----2

THIS SEARCH	THIS DOCUMENT	GO TO
<u>Next Hit</u>	<u>Forward</u>	<u>New Bills Search</u>
<u>Prev Hit</u>	<u>Back</u>	<u>HomePage</u>
<u>Hit List</u>	<u>Best Sections</u>	<u>Help</u>
	<u>Doc Contents</u>	

THIS SEARCH	THIS DOCUMENT	GO TO
Next Hit	Forward	New Bill Search
Prev Bit	Back	HomePage
Hit List	Best Sections	Help
	Doc Contents	

Bill 3 of 4

There are 3 other versions of this bill.

References to this bill in the Congressional Record	Link to the Bill Summary & Status file.	Full Display - 19,348 bytes. [Help]
---	---	---

Telephone Advertising Consumer **Rights** Act (House Bill Referred to a Senate Committee)

HR 1304 RFS

102d CONGRESS

1st Session

H. R. 1304

IN THE SENATE OF THE UNITED STATES

NOVEMBER 18 (legislative day, NOVEMBER 13), 1991

Received; read twice and referred to the Committee on Commerce, Science, and Transportation

AN ACT

To amend the Communications Act of 1934 to regulate the use of telephones in making commercial solicitations

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Telephone Advertising Consumer Rights Act'

SEC. 2. FINDINGS.

The Congress finds that

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing



techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to \$435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

Title II of the Communications Act of 1934 is amended by inserting immediately after section 226 (47 U.S.C. 226) the following new section:

SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

(a) DEFINITIONS.- As used in this section:

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator;

(B) to dial such numbers; and

(C) to deliver, without initial live operator assistance, a prerecorded voice message to the number dialed, with or without manual assistance.